

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 17-98:

FRENCHTOWN EDUCATION
ASSOCIATION, MEA/NEA,

Complainant,

vs.

FRENCHTOWN PUBLIC SCHOOLS,
DISTRICT 40, FRENCHTOWN,
MONTANA,

Respondent.

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
AND RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

On October 15, 1997, the Frenchtown Education Association (Association) filed an unfair labor practice charge with the Board alleging that the Frenchtown Public School District, District No. 40, Frenchtown, Montana (District) violated § 39-31-401(1), (4), and (5), MCA. The Association alleged that the District unilaterally changed a mandatory subject of bargaining by modifying a long standing practice of paying the registration fee for courses offered for horizontal movement on the salary schedule and began requiring certain teachers pay registration fees themselves. In particular, in June, 1997, the District notified teacher Kathy Gaul that it would allow her horizontal movement only if she paid the registration fee for an otherwise acceptable course. The Association also alleged that the District actions violated § 39-31-401(1) and (4), MCA, by retaliating against Gaul for filing a grievance and prevailing in an arbitration pursuant to a collective bargaining agreement.

1 Hearing Officer Michael T. Furlong conducted a hearing on
2 this matter on October 7, 1998 at the Frenchtown School,
3 Frenchtown, Montana. The Association was represented by Karl
4 Englund, Attorney at Law, Missoula, Montana. The District was
5 represented by Don K. Klepper, Ph.D., Missoula, Montana. Kay
6 Winters, Cathy Childs, Patti Nau, Kathy Gaul, and Mary Brannin
7 appeared as witnesses for the Association. Peggy Anderson
8 appeared as a witness on behalf of the District.

9 The Association's Exhibits 1 through 12 and District's
10 Exhibits A through T were admitted into evidence. Parties
11 completed submittal of post-hearing briefs and reply briefs on
12 November 19, 1998.

13 II. ISSUES

14 Whether the District committed unfair labor practices in
15 violation of § 39-31-401(1), (4) and (5), MCA.

16 III. FINDINGS OF FACT

17 1. The Association is the exclusive bargaining
18 representative for certified staff employed by the District. The
19 Association and the District have been parties to a series of
20 collective bargaining agreements for a number of years. On
21 April 1, 1995, the Association and the District executed a three
22 year collective bargaining agreement which expired on June 30,
23 1998¹ (Respondent's Exhibit A).

24 2. The collective bargaining agreement establishes a
25 salary schedule, Id. at Appendix A, by which salary is based on
26 an employee's education and experience. Educational credits for
27

28 ¹This contract was in force and effect at the time of this dispute.

1 advancement on the salary schedule are earned in a variety of
2 ways. Teachers may earn college credits at an institution of
3 higher education. In addition, teachers have a continuing
4 education requirement by which they must earn 60 credits every
5 five years to renew their teaching certificates. Credits earned
6 taking classes that are accredited for continuing education
7 units, also known as renewal units or recertification units, may
8 be used for advancement on the salary schedule.

9 3. Section 7.4 of the collective bargaining agreement,
10 which governs salary advancement, provides:

11 All college credits and/or renewal units acceptable
12 towards Montana Teacher's Certification or renewal of
13 teaching certification will be accepted as additional
14 professional preparation to advance the teachers
15 preparation status on the salary schedule to the
16 BA + 45 level. Movement beyond the BA + 45 to BA + 60
17 level requires the completion of a masters degree in an
18 education related field or the equivalent of (15)
19 additional quarter credits and/or 150 renewal units
20 completed after July 1, 1991. All credits applied
21 towards movement from BA + 45 to BA + 60 and all
22 credits beyond the masters degree level must receive
23 prior approval of the superintendent. These credits
24 will be based on the following criteria:

- | | | | |
|----|---------------------|-----|------------------------------------|
| 25 | BA + 45 to BA + 60 | 1.) | Graduate or approved |
| 26 | | | undergraduate credits and/or |
| 27 | | | renewal units within an |
| 28 | | | approved program focused on |
| | | | specific educational goals |
| | | | that fit a need of the |
| | | | district. |
| | | 2.) | Be otherwise accepted by the |
| | | | superintendent. |
| | MA to MA + 15-30-45 | 1.) | Graduate or approved undergraduate |
| | | | credits and/or renewal units |
| | | | focused on specific educational |
| | | | goals that fit a need of the |
| | | | district. |
| | | 2.) | Be otherwise accepted by the |
| | | | superintendent. |

1 4. In the past, the District has sponsored classes in
2 which teachers earn credits for salary advancement. Since
3 July 16, 1995, the District has been recognized by the Office of
4 Public Instruction as a "provider of professional development"
5 (Respondent's Exhibit F). The District sponsors classes which
6 are accredited for continuing education units. Also, the
7 District has paid registration fees for teachers who take classes
8 from other organizations. Prior to March 1997, the District
9 never conditioned payment of registration fees on whether the
10 applicant intended to use the credits for salary advancement, nor
11 did it condition the use of credits for salary advancement on
12 whether it paid the registration fee.

13 5. Kathy Gaul has been employed as a teacher within the
14 District and a member in good standing of the Association since
15 September 1985. In March 5, 1997, she learned of a class that
16 would be offered on April 17, 1997 by the University of the
17 Pacific entitled "Simply Science." It was Gaul's understanding
18 that the District would pay the registration fee for the class.

19 6. On March 5, 1997, Gaul submitted her initial "Teacher
20 Request for Approval of Credit" to the District for the course.
21 She indicated on the form that she wished to use credits for
22 salary advancement (Complainant's Exhibit 2(A)).

23 7. On March 11, 1997, the District superintendent denied
24 Gaul's request to use the credits for salary advancement, stating
25 it would not be allowed because the District was paying or
26 contributing to the class. The Superintendent explained that the
27 District was willing to pay the registration fee for teachers who
28 attended the class but only on the condition that teachers not

1 use the credits earned for salary advancement. Gaul enrolled and
2 successfully completed the class. The District paid the \$49.00
3 registration fee for Gaul.

4 8. On April 29, 1997, Gaul again sought approval for use
5 of the credits earned for salary advancement (Complainant's
6 Exhibit 2D). On May 15, 1997, the District superintendent
7 approved the request on the condition that Gaul pay the
8 registration fee. On June 5, 1997, Gaul reimbursed the District
9 in the amount of \$49.00 for the cost of the registration fee.

10 9. According to the Association's president, Mary Brannin,
11 and Association's grievance officer, Cathy Childs, this was the
12 first instance in which the District based the decision to
13 approve the credits solely on whether the District paid the
14 registration fee. Childs prepared a list of classes either
15 sponsored by the District or paid for by the District which
16 included examples of teachers who used the credits earned for
17 salary advancement (Association Exhibit 6).

18 10. Patricia Nau is also a teacher employed by the
19 District. Nau attended the "Simply Science" class on April 17,
20 1997. The District paid the registration fee for the class
21 (Complainant Exhibit 5). The District also approved the course
22 credit Nau earned for advancement on the salary schedule.

23 11. On June 7, 1997, the Association filed a grievance
24 pursuant to Section 7.4 of the collective bargaining agreement
25 (District Exhibit A) on behalf of Kathy Gaul which stated:

26 The Frenchtown Education Association files this grievance on
27 behalf of Kathy Gaul. This grievance concerns a one-credit
28 workshop which Mrs. Gaul attended on April 19, 1997. The
credit was approved by the superintendent, Mr. John
Hargrove, with the stipulation that Mrs. Gaul would pay the
entire cost of the workshop and the university credit and

1 would not be eligible to use Eisenhower funds to cover the
2 workshop portion of the fee. It is our belief that this
3 policy is in violation of our collective bargaining
4 agreement, Frenchtown School District #40 Master Contract,
5 including, but not limited to Article VII, Professional
6 Compensation, Section 7.4, Recognition for Additional
7 Preparation, as well as the school district's past practice.

8 The following relief is sought:

- 9 (1) The district will reimburse Kathy Gaul for the workshop
10 portion of the fee (\$49.00), while still approving the
11 credit for advancement on the salary schedule.
- 12 (2) The district will make the grievant (Kathy Gaul) whole
13 for any losses and will provide any relief called for.
14 Exhibit 3(a).

15 12. On June 12, 1997, Peggy L. Anderson, Elementary
16 Principal, wrote to Mary Brannin, Association Grievance
17 Representative:

18 In response to your letter received June 7, 1997, concerning
19 the grievance filed on behalf of Kathy Gaul. It is not
20 within my level of administrative responsibility to resolve
21 this issue. The final decision for this rests with the
22 Superintendent of Schools per the Master Agreement, Article
23 VII, Section 7.4, pages 11 and 12. Exhibit 3b).

24 13. On June 17, 1997, Mary Brannin, Association Grievance
25 Representative, wrote to Superintendent Hargrove and stated:

26 The Frenchtown Education Association wishes to appeal to
27 Level II the grievance filed on behalf of Kathy Gaul. The
28 grievance was denied at Level I by the principal, Dr. Peggy
Anderson, on the grounds that a decision on this matter was
not within her level of administrative responsibility. This
initial denial was received by the F. E. A. on June 12,
1997. We would like to now proceed with the Level II
meeting as soon as possible. Exhibit 3(c).

14. Superintendent Hargrove scheduled a Level II grievance
meeting for Gaul for Monday, July 7, 1997. The meeting was
subsequently rescheduled and conducted on July 9, 1997.

15. On July 15, 1997, Superintendent Hargrove notified the
Association grievance representative by letter that he was

1 denying the grievance at Level II indicating he could find no
2 breach of contract language to support the Association's
3 allegations.

4 16. On July 21, 1997, Gaul submitted a written appeal to
5 Superintendent Hargrove which stated:

6 I wish to appeal both the 9-credit and the 1-credit
7 grievances to Level III, the Board of Trustees. I believe
8 it would be more convenient for everyone involved if both
9 grievances were scheduled for the same board meeting. I
10 know that Cathy Childs has already talked to you regarding
11 the fact that some of the people who need to be at this
12 meeting are unavailable during the last two weeks of July.
13 I just wanted to let you know that I do not mind waiting
14 until early September to schedule the grievance meeting with
15 the Board of Trustees. Please notify Cathy Childs, Mary
16 Brannin, and myself as to when this board meeting will be
17 held.

18 17. Initially, the Level III grievance was scheduled to be
19 heard at the July 28, 1997 Board meeting. However,
20 Superintendent Hargrove informed the Association representatives
21 that the Board members would not be available to meet until late
22 in September 1997. Therefore, the level III grievance meeting
23 set for on July 28, 1997 had to be canceled. Both parties agreed
24 to postpone the matter until the Board meeting in late September
25 1997.

26 18. On July 22, 1997, the Association grievance
27 representative Mary Brannin wrote to Dennis Hutchison, Board
28 Chair, and stated:

29 The Frenchtown Education Association wishes to appeal to
30 Level III the grievance filed on behalf of Kathy Gaul in
31 regard to the one-credit class. This grievance was denied
32 at Level II by the superintendent, John Hargrove after a
33 meeting was held on July 9, 1997, in accordance with the
34 grievance procedure in the master agreement.

35 We would like to schedule this meeting along with the Level
36 III meeting on the sabbatical credits at the same time. We
37 would be willing to wait until a September date should this

1 be more convenient for the board members. Please contact
2 Cathy Childs or myself as to a possible meeting time.
3 Exhibit 3(f).

4 19. On September 2, 1997, the parties agreed to a hearing
5 concerning the Gaul grievances at the board meeting scheduled for
6 September 24, 1997. Both parties agreed that there were two
7 separate grievances to be heard, one involving the one credit
8 "Simply Science" class, and one involving credit for the multiple
9 graduate classes she had completed during her sabbatical.

10 20. On September 24, 1997, the Board conducted the level
11 III hearing on the grievance. At the hearing, the Association's
12 representatives stated that they were not advancing the grievance
13 under Article VII, Section 7.4 (Complainant's Exhibit A), as they
14 had previously indicated. Rather, the Association advanced the
15 grievance to Level III based on the contention that the District
16 had unilaterally changed the past practice concerning payment of
17 course registration fees for the teachers.

18 21. The Board denied the Association's request for a ruling
19 on past practice, contending there was no maintenance of
20 standards language found in the contract concerning that issue.
21 The Board determined that pursuant to Section 13.4³ of the
22 contract, the parties were precluded from bargaining concerning

23 ³13.4 Scope of Agreement

24 This Agreement constitutes the entire agreement between the
25 parties and no verbal statements or past practices supercede any
26 of its provisions. Any amendment supplemental hereto shall not
27 be binding upon either party unless executed by the parties
28 hereto. The parties further acknowledge that during the course
of collective bargaining each party has the unlimited right and
opportunity to offer, discuss, accept or reject proposals.
Therefore, for the term of this Agreement, no further collective
bargaining shall be had upon any provisions of this Agreement,
nor upon any subject of collective bargaining, unless by mutual
consent of the parties hereto.

1 the issue of past practice during the term of the contract
2 without mutual consent of the parties. On October 1, 1997, the
3 District formally notified the Association by letter that the
4 Board denied the Gaul grievance at level III.

5 22. The Association responded to Superintendent Hargrove on
6 October 13, 1997, as follows:

7 In spite of the fact that the Association is dissatisfied
8 with the decision of the Board on this grievance, we will
9 not be submitting the grievance to arbitration. Instead,
10 the Association will file Unfair Labor Practice charges
11 against the School District with the Board of Personnel
12 Appeals.

13 We have made this decision because both law and contract
14 require us to select a single course of action at this stage
15 of a dispute and we believe an Unfair Labor Practice charge
16 to be preferable to arbitration in this case.

17 Please be advised that this choice does not constitute a
18 waiver of our rights to pursue this case vigorously
19 including making any arguments in the Unfair Labor Practice
20 charge that we might have chosen to make in arbitration.

21 23. The Association filed ULP 17-98 on October 15, 1997,
22 accusing the Board of a violation of the contract for not paying
23 the workshop fee, and of retaliation. Specifically, the
24 Association charged:

25 The defendant School District violated 39-31-401 (1) and
26 (5), MCA, when it unilaterally changed a mandatory subject
27 of bargaining by unilaterally modifying a long standing
28 practice of paying the registration fee for courses offered
for horizontal movement on the salary schedule and began
requiring certain teachers to pay the registration fee
themselves. In particular in June, 1997, the School
District notified teacher Kathy Gaul that it would allow her
horizontal movement only if she paid the registration fee
for an otherwise acceptable course.

The School District violated 39-31-401 (1) and (4), MCA, by
retaliating against teacher Kathy Gaul for filing a
grievance and prevailing in an arbitration pursuant to a
Collective Bargaining Agreement. In particular, the School
District required Kathy Gaul to pay for registration when it
did not require other teachers to do so.

1 The Association sought the following remedy:

2 Cease and desist from making unilateral changes in mandatory
3 subjects of bargaining, reinstate the practice of paying for
4 the registration fee for courses taken for horizontal
5 movement and reimburse Kathy Gaul \$49.00 for payment of
6 registration fee for class for horizontal movement.

7 Cease and desist from retaliating against Kathy Gaul for
8 exercising her rights under the law.

9 Additionally, the School District shall post an appropriate
10 notice informing employees that it violated the law and that
11 it will cease from continuing to do so.

12 24. Gaul and the Association assert that the District's
13 decision not to pay the registration fee for the "Simply Science"
14 course resulted from hostility towards Gaul, which began when she
15 contested a decision denying her request for sabbatical leave.
16 In the fall of 1995, Gaul applied for sabbatical leave as
17 provided for in Section 8.6 of the collective bargaining
18 agreement so she could attend the University of Montana. The
19 District denied her request.

20 25. Gaul filed a grievance regarding her leave request
21 through the Association.

22 26. The grievance was processed through the grievance
23 procedure to arbitration in accordance with the provisions of the
24 collective bargaining agreement. Following the arbitration
25 hearing, the arbitrator ordered the District to grant Gaul a
26 sabbatical leave for the school year 1997-98, based on her
27 October 25, 1995 leave request for the 1996-1997 school year,
28 which the board improperly denied. (Association Exhibit 7).

29 27. Following the arbitrator's ruling, the District
30 notified Gaul that she was to follow application procedures no
31 later than November 1, 1996, if she was planning to request

1 sabbatical in accordance with the arbitrator's decision
2 (Complainant Exhibit 8). Gaul responded that she intended to
3 accept the leave and that according to the arbitrator's decision,
4 she need not apply again.

5 28. The superintendent appointed a review committee to make
6 a recommendation as to whether Gaul should be allowed sabbatical
7 leave. The District asked the Association to participate in the
8 review. However, the Association declined, referring to the
9 arbitrator's order granting the sabbatical leave (Complainant
10 Exhibit 12).

11 29. On April 14, 1997, Gaul submitted an application to
12 have the credits earned from courses taken during the first
13 semester of the sabbatical used for salary advancement
14 (Complainant Exhibit 10). The District denied Gaul's request
15 because the credits were earned during the sabbatical. As a
16 result, the Association filed a grievance which was processed
17 through the grievance procedure and arbitration. The arbitrator
18 ruled in the Association's favor.

19 30. Gaul subsequently applied to have the credits earned
20 for some courses taken during the second semester of the 1997-98
21 school year sabbatical used for salary advancement. The District
22 also denied the request. Again, the Association filed a
23 grievance under the collective bargaining agreement. At the time
24 of the hearing, that grievance was scheduled to go to
25 arbitration.

26 31. Elementary Building Principal Peggy Anderson informed
27 the elementary teaching staff in February or March 1997 that if
28 they took the "Simply Science" class for salary advancement, they

1 would be required to pay their own registration fees. Anderson
2 also discussed this issue with Gaul and other staff members on
3 April 15 and April 22, 1997 during faculty meetings. Anderson
4 indicated that the District was attempting to standardize its
5 policies on paying for credits.

6 32. The District paid the registration fee for teacher
7 Patricia Nau for a course entitled "The Learning Workshop" in
8 April 1997. (District Exhibit H). The District maintained it
9 paid Nau's registration fee in addition to letting her receive
10 salary schedule advancement on the basis that she was receiving
11 Eisenhower grant money. Gaul was not receiving Eisenhower money.

12 IV. DISCUSSION/RATIONALE

13 A. Refusal to bargain in good faith (violation of
14 § 39-31-401(1) and (5), MCA)

15 Montana Law requires public employers to bargain
16 collectively in good faith with labor organizations representing
17 their employees on issues of wages, hours, fringe benefits, and
18 other conditions of employment. §39-31-305, MCA. The failure to
19 bargain collectively in good faith is a violation of § 39-31-
20 401(5), MCA.

21 The Association alleges the District violated § 39-31-401(1)
22 and (5) MCA by unilaterally changing a mandatory subject of
23 bargaining. Specifically, Association alleges that the District
24 denied to pay Gaul's registration fee for the "Simply Science"
25 course because she elected to use the earned credit for salary
26 advancement. Thus, it forced the Association to accept a change
27 in a long standing past practice of the District paying the
28 registration fee while allowing the teachers to use the credits

1 for salary advancement without further bargaining during the term
2 of the contract.

3 The District denies that it changed its practice. It also
4 contends that the Association waived its right to bargain by not
5 requesting bargaining sooner, and that under Section 13.4 of the
6 collective bargaining agreement (which it refers to as the
7 contract's management rights or "zipper" clause), there is no
8 maintenance of standards language concerning "past practice."
9 Therefore, the contract is "zipped" and the Association waived
10 its rights to bargain over this issue.

11 The Montana Supreme Court has approved the practice of the
12 Board of Personnel Appeals in using federal court and National
13 Labor Relations Board (NLRB) precedent as guidance in
14 interpreting the Montana Collective Bargaining for Public
15 Employees Act. State ex rel. Board of Personnel Appeals v.
16 District Court, 183 Mont. 223, 598 P.2d 1117, 103 LRRM 2297
17 (1979); Teamsters Local No. 45 v. State ex rel. Board of
18 Personnel Appeals, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012
19 (1981); City of Great Falls v. Young (Young III), 211 Mont.
20 13, 686 P.2d 185, 119 LRRM 2682(1984).

21 The basic, fundamental purpose of labor relations is the
22 good faith negotiation of the mandatory subjects of bargaining--
23 wages, hours, and other terms and conditions of employment. For
24 an employer to make unilateral changes during the course of a
25 collective bargaining relationship concerning mandatory subjects
26 of bargaining is considered a violation of the requirement of
27 good faith bargaining. NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177
28 (1962).

1 The collective bargaining agreement contained provisions
2 bargained for by the parties which governed salary advancement
3 and which did not condition the use of the credits for
4 advancement on whether the District had paid any of the costs.
5 Although the contract contained general language allowing the
6 superintendent to determine the acceptability of classes for
7 salary advancement, the District never conditioned acceptance of
8 classes for credit on whether it paid the costs prior to the
9 request by Kathy Gaul in March 1997. The District had a long
10 standing practice of allowing classes to be used for credit if
11 they met the other criteria of Section 7.4. The District has not
12 identified a single instance prior to the incident involved which
13 required a teacher to pay the registration fee in order to
14 receive course credits for salary advancement.

15 Although the law requires good faith bargaining prior to
16 changes in mandatory subjects of bargaining, the parties to a
17 collective bargaining agreement may waive their right to
18 bargaining during the term of an agreement. The District relies
19 on Section 13.4 or "zipper clause" of the collective bargaining
20 agreement to support the assertion that the Association waived
21 its right to bargain over the matter. A zipper clause must meet
22 the standard of any other form of waiver. Angelus Block Co.,
23 250 NLRB 868, 877 (1980).

24 In general, a zipper clause is an agreement
25 by the parties to preclude further bargaining
26 during the term of the contract. If the
27 zipper clause contains clear and unmistakable
28 language to that effect, the result will be
that neither party can force the other party
to bargain, during the term of the contract,
about matters encompassed by the clause.
That is, the zipper clause will "shield" from
a refusal to bargain charge, a party to whom

1 such a bargaining demand is made. Similarly,
2 under such a clause, neither party can
3 unilaterally institute, during the term of
4 the contract, a proposal concerning a matter
encompassed by the clause. That is, the
zipper clause cannot be used as a "sword" to
accomplish a change from the status quo.

5 Michigan Bell Telephone Company, 306 NLRB 281, 282 (1992).

6 The Board has upheld the use of zipper clauses similar to
7 the one contained in this agreement in support of a finding that
8 a union waived its right to collective bargaining. Montana
9 Public Employees Association v. Department of Justice,
10 ULP No. 17-87(1988).

11 In The Mead Corporation, 318 NLRB 201, 1995 WL 461270
12 (1995), the National Labor Relations Board found that
13 implementing changes in working conditions in this manner
14 constituted an unfair labor practice. Both the Association and
15 the District waived their rights to bargaining during the term of
16 the agreement. This clause protects employees from unilateral
17 changes in working conditions. By agreeing that one party cannot
18 force another party to bargain, the parties have agreed to
19 maintenance of the status quo without exception. Neither party
20 may change the contract or an established practice without first
21 bargaining. Since neither party is obligated to bargain, neither
22 party can change the contract or an established practice. The
23 zipper clause in this case precludes the District from
24 implementing new terms or conditions of employment, in the
25 absence of assent by the union. In other words, an agreement
26 that neither party is obligated to bargain is a double-edged
27 sword. It applies to both parties and because neither can be
28 forced to bargain, neither can force the other to accept a change

1 in the status quo. The fact that the Association did not request
2 bargaining is irrelevant. The district committed an unfair labor
3 practice when it unilaterally changed a term of employment
4 without bargaining.

5 B. Retaliation (violation of § 39-31-401(1), MCA)

6 The Association alleges that the District's decision to
7 condition approval of Gaul's Simply Science credits for movement
8 on the salary schedule was motivated by retaliation for Gaul's
9 grievances under the collective bargaining agreement. It is an
10 unfair labor practice for an employer to "interfere, restrain, or
11 coerce employees in the exercise of the rights guaranteed in
12 39-31-201." § 39-31-401(1), MCA. The filing and processing of
13 grievances, whether according to the terms of a collective
14 bargaining contract or informally in the absence of a contract,
15 is concerted activity protected by § 39-31-201, MCA, and any
16 denial of contractual benefits based on the employee's filing of
17 grievances is therefore a violation of § 39-31-401(1), MCA.
18 Columbia University, 236 NLRB 793 (1978); John Sexton & Co.,
19 217 NLRB 80 (1975); Ernst Steel Corp., 212 NLRB 78 (1974);
20 Interboro Contractors, 157 NLRB 1295 (1966) (holding that
21 individual activity involving peaceful attempts to enforce
22 collective bargaining agreement is protected concerted activity).

23 The NLRB's well settled rule is that motive is not a
24 critical element in a charge of interference, coercion or
25 intimidation for protected activity:

26 Interference, restraint and coercion under
27 Section 8(a)(1) of the Act does not turn on
28 the employer's motive or on whether the
coercion succeed or failed. The test is
whether the employer engaged in conduct
which, it may reasonably be said, tends to

1 interfere with the free exercise of employee
2 rights under the Act.

3 American Freightways Co., 124 NLRB 146, 147 (1959), (emphasis
4 added).

5 Put another way, the law does not require the charging party
6 prove subjective intent. Rather, the test is an objective one --
7 whether the employer engaged in conduct which, a reasonable
8 person would conclude, tends to interfere with the free exercise
9 of the rights of the employees.

10 In its charge, the Association contends that there is a
11 clear pattern of District abuse of Gaul beginning when she
12 challenged the decision not to grant a sabbatical leave. The
13 Association alleges that the charge is further supported by the
14 fact that after Gaul challenged the District's decision, an
15 arbitrator ruled in her favor. However, the District denial of
16 Gaul's request for approval of credits is at issue in this case.
17 The Association believes that it did so in retaliation for her
18 pursuit of her contract grievances to arbitration.

19 Taking an adverse employment action against an employee
20 based on the fact that she has filed a grievance under the
21 Collective Bargaining Act violates § 39-31-401(1) and (3), MCA.
22 Young v. City of Great Falls (Young II), 198 Mont. 349, 646 P.2d
23 512 (1982). Gaul filed her first grievance concerning her
24 sabbatical in January of 1996. The arbitrator ruled in her favor
25 in September 1996. Despite the District's initial effort to
26 require her to reapply for the sabbatical, Gaul took her
27 sabbatical in accordance with the arbitrator's decision. The
28 District denied Gaul's request to use the Simply Science credits

1 on March 11, 1997. The events which gave rise to Gaul's second
2 and third grievances occurred after March 11, 1997. The timing
3 of the events does not support a finding of retaliatory treatment
4 or suggest interference with employee rights under the Act.

5 C. Alleged violation of §39-31-401(4), MCA.

6 The Association also alleges a violation of §39-31-401(4),
7 MCA. Neither the evidence nor the arguments of the Association
8 establish a violation of this provision. At hearing, the
9 District maintained that its purpose in developing guidelines
10 which prohibited using credits from the Simply Science course for
11 salary advancement was to standardize its policies. This
12 rationale is troubling in view of the fact that the District paid
13 for Patricia Nau to take the class and allowed her to use the
14 credits. It also paid for Nau to take another course. However,
15 on balance the evidence does not establish either retaliatory
16 intent or that the conduct tended to interfere with the free
17 exercise of employee rights under the Collective Bargaining Act.

18 V. CONCLUSIONS OF LAW

19 1. The Board of Personnel Appeals has jurisdiction in
20 these matters pursuant to § 39-31-405, MCA.

21 2. The District violated § 39-31-401(1) and (5), MCA, by
22 its action of unilaterally altering a mandatory subject of
23 bargaining.

24 3. The District did not interfere with, restrain, or
25 coerce Kathy Gaul in violation of § 39-31-401(1) and (4), MCA.

1 VI. RECOMMENDED ORDER

2 The District is hereby ordered:

3 1. To rescind the rule requiring teachers to pay the
4 registration fee for classes if they intend to use the credits
5 earned for salary advancement;

6 2. To reimburse all teachers who were required to pay the
7 registration fee for classes solely because they intended to use
8 for credit for advancement on salary schedule;

9 3. To cease the practice of unilaterally altering terms
10 and condition of employment subject to the collective bargaining
11 agreement without obtaining the agreement of the Association to
12 bargaining;

13 4. To reinstate all leave taken by teacher to participate
14 in these proceedings;

15 5. To post copies of the notice contained in Appendix A at
16 conspicuous places, including all places where notices to
17 employees are customarily posted, at the school district for a
18 period of 60 days and to take reasonable steps to ensure that the
19 notices are not altered, defaced or covered by any other
20 material.

21 DATED this 4th day of June, 1999.

22 BOARD OF PERSONNEL APPEALS

23 By:

24 Michael T. Furlong
25 MICHAEL T. FURLONG
26 Hearing Officer
27
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